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OFFICE OF THE CHAIRMAN

January 24, 2005

MEMORANDUM

AGENDA ITEM

For Meeting of: 01-27-05

TO: The Commission

FROM: Scott E. Thomas
Chairman *[Signature]*

SUBMITTED LATE

SUBJECT: Amendment of Draft Advisory Opinion 2004-45

I believe we need to revise the draft to better reflect the letter and spirit of the statute. The draft adopts an accounting principle that disregards whether any of the 'Millionaires Amendment' funds truly are "excess contributions." Specifically, it overlooks whether a committee had millions of non-Millionaires Amendment dollars on hand before it began receiving Millionaires Amendment funds.¹ While the end result may be the same for the Salazar Committee, we should require committees in this situation to assess their overall cash on hand situation, as of campaign's end, and determine whether any of the remaining contributions need to be returned.

The approach I suggest is more in line with the approach the Commission takes in analogous situations. For example, when a committee wants to identify which funds were expended, and hence are not part of the available cash on hand, it uses a first-in-first-out (FIFO) approach. This is reflected in the regulations at 11 CFR 110.3(c)(4) and (5)(ii) (allowing analysis of the cash on hand balance for contribution aggregation purposes).²

¹ We don't have that indication for the Salazar Committee, but we wouldn't want to adopt an accounting format that would fundamentally undermine the statute for any other committee that could claim authority to rely on this advisory opinion.

² See also Advisory Opinions 1994-16 (PAC should use 'last contributed/first returned' approach for returning contributions); 1991-12 (PAC should use 'contributions most recently received' analysis for identifying funds permissible for transfer to authorized committee and for contribution limit purposes); 1982-52 (similar).

In situations where there is an overriding need to reduce agency oversight and burdens, the FEC has resorted expressly to a last-in-first-out accounting method. Thus, when determining when a publicly funded presidential primary campaign has expended its public funding payments for non-qualified campaign expenses, the FEC has ruled that it will only examine those disbursements made immediately after the last payment. 11 CFR 9038.2(b)(2)(iii)(B) ("assumption that the last payment has been expended on a last-in, first-out basis"). Clearly, this situation is distinguishable. The FEC does not have to audit

In the context of the Millionaires Amendment, common sense indicates that the primary rationale of the excess refund provisions is to reclaim any Millionaires Amendment funds not needed for the election in question. This prevents windfalls and the creation of unwarranted campaign war chests. If, hypothetically, the Salazar campaign already had \$3 million in net cash on hand before any of the Millionaires Amendment funds came in, the Millionaires Amendment funds would not have been needed. (The approximately \$1.7 million in obligations from October 24 on through the end of the general election could have been covered by the non-Millionaires Amendment funds.)

By using the same approach we follow for figuring out which funds were expended under the regulations cited above, we strike a balance between the need to identify which Millionaires Amendment funds were not needed and the need to apply common accounting principles regarding which funds were "expended." Rather than disregarding the possibility that the Millionaires Amendment funds were in real terms "excess," this method allows for a familiar net debt/surplus calculation as of the date of the election (*see* 11 CFR 110.1(b)(3)(ii)), and a simple FIFO analysis of the last receipts to determine which constitute Millionaires Amendment contributions.

By way of example, if as of election day the net debt/surplus calculation showed a net surplus of \$300,000, the committee in question would start with its last receipt and work backward to identify which particular receipts constitute the last \$300,000. The last receipt might be a \$6,000 contribution, \$4,000 of which are Millionaires Amendment funds. The next-to-last receipt might be a \$2,000 contribution, all of which are non-Millionaires Amendment funds. The third-to-last receipt might be a \$4,000 contribution all of which are Millionaire Amendment funds. If, after working back through \$300,000 in last receipts, one-third of those receipts (\$100,000) represent Millionaires Amendment funds, those receipts would have to be returned to the donors.³

campaigns operating under the Millionaires Amendment; thus, similar concerns about agency oversight and burdens are not present. Moreover, committees operating under the Millionaires Amendment must calculate net debt/surplus anyway in order to avoid contribution limit problems stemming from post-election contributions (*see* 11 CFR 110.1(b)(3)), and identifying specific Millionaires Amendment funds in the net surplus is relatively easy. Unlike the task of analyzing whether specific disbursements were qualified campaign expenses, the task of identifying which funds are in a surplus will tax neither the FEC nor the committees involved.

³ This approach is more generous than the approach the Commission uses in the public funding process. There, when a committee is shown to have a surplus, the Commission simply assumes the appropriate proportion of public funds is in that surplus and seeks repayment of that amount. There is no evaluation of whether the net surplus in fact contains public funds based on a FIFO analysis. *See* 11 CFR 9038.2(b)(4), (b)(2)(iii); 9007.2(b)(3). The considerations are different in a Millionaires Amendment situation. The statute requires the FEC to analyze whether Millionaires Amendment funds were "expended in connection with the election." This seems to be a more particularized analysis than the process of simply determining whether or not there was a surplus, and it is not related to the use of public funds. If the evaluation of the surplus reveals that particular receipts are not Millionaires Amendment funds, there is no strong argument that they represent Millionaires Funds, let alone Millionaires Amendment funds not expended.

This approach tracks the "expended in connection with the election" phrasing of the statute and frees a committee from refunding Millionaires Amendment funds in fact already spent and therefore not part of the net surplus. For example, if a committee had received \$500,000 in Millionaires Amendment funds, but the committee only had a surplus of \$300,000, only the last \$300,000 in receipts would have to be analyzed to determine if Millionaires Amendment funds were on hand and hence subject to refund. The other \$200,000 in Millionaires Amendment funds obviously were "expended," since under any accounting method they are not in the 'pot' remaining.

Accordingly, I suggest revising the agenda document as follows:

1. On p. 1, line 17, after "may" insert "not".
2. On p. 2, lines 18 and 19, substitute "No" for "Yes", insert after "may" the word "not", and delete "a generally accepted accounting principle,".
3. On p. 3, lines 6-9, delete sentence beginning with "Because" and substitute:

Nonetheless, the statutory language indicates that Congress wanted some evaluation of the funds "not otherwise expended in connection with the election." The Commission concludes that to make such an assessment, the overall posture of the committee for the election in question needs to be addressed, not just the disbursement activity following receipt of Millionaires Amendment funds. This approach most closely tracks the accounting principles used by the agency in analogous contexts to identify the net surplus of a campaign as of the date of the election and the particular receipts therein. At 11 CFR 110.1(b)(3)(ii) the Commission has set forth its policy for calculating overall whether there is a net surplus with respect to a particular election, and at 11 CFR 110.3(c)(4) and (5)(ii) the Commission has set forth its policy for determining which particular receipts are in any net surplus. Essentially, these provisions would require the Salazar Committee to evaluate whether a net surplus existed for the committee as of the date of the general election, and, if so, would further require the Committee to evaluate the last receipts comprising this surplus to determine which constitute Millionaires Amendment funds. While, ultimately, the result may be the same for the Salazar Committee as if it used its suggested LIFO approach, the Commission's approach will assure that other receipts pre-dating the acceptance of Millionaires Amendment funds will be considered, and, in a surplus situation, will assure there is a more accurate assessment whether the Millionaires Amendment funds were truly expended.